Denver Law Review

Volume 31 | Issue 12 Article 5

June 2021

Family Law, Probate Law, and Constitutional Law

Sam Frazin

ployees. The evidence in the case indicated that the employer involved, during the months of December, 1952, and January, 1953, had 14 employees working in the mine. In a report to the government, the employer had reported his yearly average of employees was 6.7. The State Coal Mine Inspection Report for the vear 1952 showed that the company had an average of 9.4 men working during that year.

The Court held that to determine whether employees are "regularly engaged", the test is to determine whether the employment was casual or whether these were regular employees engaged in the business. It was held that the employees involved were regular employees and not casual laborers and that therefore the Industrial Commission had jurisdiction to hear the dispute.

In the case of *Pension Fund Trustees v. Starasinich,*[18] the plaintiff was a police officer on the Pueblo Police Department for 23 years up to July 30, 1949, when he was discharged for misconduct. After his discharge, he applied for a pension, claiming that he had incurred physical disabilities while he was a police officer in good standing. The question to be determined was whether after discharge an officer could apply for and receive a pension. The argument of the trustees was that under the statutes and ordinances applicable, an officer must be in good standing at the time of the application to be entitled to a pension. The Court held that in order to be entitled to a pension, an officer must be in good standing at the time of death or injury and that the fact that he has been discharged since his injury will not bar him from a pension if he was in good standing at the time of the injury.

From its title, the case of *Shore v. Denver Bldg. & Construction Trades Council,*[19] would appear to be a case involving labor law. An examination of the case will reveal that basically it is a labor case but although the case has been twice tried in the District Court and twice appealed to the Supreme Court no question of labor law has yet been raised in a form calling for a decision by the Supreme Court. There will be a third trial in the District Court and probably a third appeal, and perhaps some later reviewer will have occasion to review the labor questions involved.

FAMILY LAW, PROBATE LAW, AND CONSTITUTIONAL LAW

SAM FRAZIN, *of the Denver Bar*

FAMILY LAW

I. *Lawson v. Lawson,* 1953-54 C.B.A. Adv. Sheet No. 1.

Facts: Plaintiff, the wife, was a resident of Denver throughout her entire life. She went to Fortville, Indiana, for the sole purpose of marrying the defendant who was then stationed there in

[18] 264 P. 2d 1033, 1953-54 C. B. A. Adv. Sh. No. 7.
[19] 263 P. 2d 315, 1953-54 C. B. A. Adv. Sh. No. 5.

the military service. The husband's home was in St. Joseph, Missouri, and the evidence shows he did not accept her as his wife by the way of making or attempting to make, nor did he have any thought of making, a domicile for her. She finally left and returned to Denver where she filed suit for divorce alleging mental cruelty and her residence in the state for more than one year prior to commencement of the action. Judge Edward C. Day, after hearing the evidence, questioned the sufficiency of the showing of residence, taking the position generally that plaintiff had lost her residence in Denver by leaving the state and marrying defendant in another state; that the domicile of the plaintiff was that of her husband; that she should wait for one year after her return to Denver before filing action for divorce.

Appeal: Held for Judge Day.

Reasons: A Colorado woman who marries a resident of another state acquires the domicile of her husband and must wait one year after her return to Colorado before filing an action for divorce in this state. It is interesting to note as said by the Supreme Court that so far as the best interests of plaintiff are concerned, if the time consumed in presenting this Writ of Error had been used to allow the running of the period by filing another complaint, after a full year's residence had been established after plaintiff's return to Colorado, plaintiff would no doubt have had a perfectly good and valid Interlocutory Decree of Divorce long before the date of this decision.

II. *Vance v. Vance,* 1953-54 C.B.A. Adv. Sheet No. 1.

Facts: Plaintiff husband filed action for divorce on the ground of cruelty committed in Colorado. Defendant wife denied and counter-claimed alleging abandonment without cause for a Decree of Separate Maintenance. Trial by jury found wife not guilty of mental cruelty and husband not guilty of abandonment. Wife then filed a motion to set aside the verdict against her and prayed for the Decree of Separate Maintenance notwithstanding the verdict. This motion was sustained and the verdict of the jury finding that the husband was not guilty of abandonment without just cause was set aside. A Decree of Separate Maintenance was granted to the wife and alimony of $305.00 per month. Later husband filed a motion to modify the decree by terminating the maintenance on the ground that since the entry thereof the wife had been guilty of serious misconduct. The matter was heard before Honorable Robert W. Steele. Judge Steele found that by the misconduct the wife had forfeited the right to further maintenance from plaintiff.

At the time of this hearing a divorce suit filed by the husband was pending before Honorable William A. Black in another division of the District Court. It was stipulated between counsel that this divorce case be transferred from Judge Black's division to that of Judge Steele and that the testimony received by Judge Steele in the separate maintenance hearing be considered by him as testi-

mony in support of the ground of cruelty alleged in the divorce petition. Accordingly this was heard by Judge Steele as a non-contested divorce action the wife having filed no answer. Judge Steele considered the testimony presented in the separate maintenance hearing and entered an Interlocutory Decree of Divorce for plaintiff husband. About three months later defendant wife filed a motion to set aside the Interlocutory Decree of Divorce which was over-ruled. Counsel contends that the trial court erred in over-ruling the motion to vacate and set aside the Interlocutory Decree generally on the ground that an Interlocutory Decree in Divorce cannot be granted without the presentation of any evidence; that the parties cannot stipulate that the testimony in another case be considered as evidence sufficient for the entry of a Decree of Divorce.

Appeal: Held for husband.

Reasons: 1. The right to separate maintenance may be lost by serious acts of misconduct.

2. Parties may stipulate that the record of testimony in a separate maintenance action shall be accepted as a substitute for evidence in a later divorce case when that testimony relates to the same parties, time and events. This is not a stipulation that a divorce be granted.

III. *Russ v. Russ*, 1953-54 C.B.A. Adv. Sheet No. 2.

Facts: Plaintiff wife divorced defendant husband. Husband had adopted James, a minor son of the wife by a former marriage. The decree provided "to pay for the support of James the sum of $100.00 per month and further to pay all medical expenses that may be incurred necessarily for James Russ including the cost of any necessary operations until he should become 18 years of age." It was further agreed and provided in the decree that a named mutual friend shall be the sole judge as to the necessity of medical and special care and expenditures for James Russ, but if for any reason she cannot or does not exercise her judgment in the matter then the question of medical necessities and attention shall be decided by the District Court of Alamosa County; Colorado or by any judge.

Wife thereafter filed motion to require former husband to pay $1661.45 for hospital and medical expenses. Court ordered husband to pay bills totaling $1381.11.

Appeal: Held for defendant husband.

Reasons: 1. A husband cannot be compelled to pay unnecessary medical expenses for a child where the terms of the divorce decree obligate him only to pay such expenses which are incurred necessarily.

2. The mutual friend named in the decree had in writing declined to exercise her judgment in the matter. The provisions of the agreement and the decree made the role of the judge that of an arbitrator rather than that of the judge of the court. He took on the status of the named mutual friend who declined to act and in

that capacity he should have listened to the evidence and made his finding as to the necessity of the expenses and then the court should have acted upon the findings so made.

3. In the absence of a decree or an agreement between the parties the liability for medical payments lies within the discretion of the Court.

IV. *Miller v. Miller,* 1953-54 C.B.A. Adv. Sheet No. 5.

Facts: Plaintiff wife sued for divorce seeking custody and control of two minor children. Defendant husband was granted the divorce on his cross-complaint and given full custody and control of the children. After the entry of the final decree the wife filed a motion for modification of the decree which later the court modified directing that the wife have custody of the children during the months of June, July and August of each year. Not being satisfied with this modification she appealed to the District Court which denied the motion and entered an order to the effect that the original order as entered in the Interlocutory Decree of Divorce remain in full force and effect.

Appeal: Held for plaintiff wife.

Reasons: Where a child becomes a ward of a County Court by virtue of a divorce action the court has continuing jurisdiction and a custody order is not a final judgment which can be appealed. I recommend the reading of the dissenting opinion by Mr. Justice Moore and concurred in by Mr. Justice Clark.)

V. *Faith v. Faith,* 1953-54 C.B.A. Adv. Sheet No. 5.

Facts: Plaintiff husband filed suit against defendant wife for divorce. Wife counter claimed and later withdrew her answer and permitted cause to proceed as a non-contested case, resulting in entry of Intelocutory Decree in favor of plaintiff. Decree contained usual provisions. One week before Decree became final plaintiff filed motion requesting the court to vacate and set aside the Interlocutory Decree. Court granted this motion over the objection of the defendant.

Appeal: Held for plaintiff.

Reasons: Trial court must grant a motion to dismiss and set aside an Interlocutory Decree of Divorce a few days before it becomes final even though the motion states no reasons, is not supported by the evidence and is objected to by the defendant. The policy of the court is to discourage rather than encourage divorces. One may well be entitled to a divorce but whether or not he will exercise that right is optional with him.

CONSTITUTIONAL LAW

I. *Higgins v. Sinnock,* 1953-54 C.B.A. Adv. Sheet No. 9.

Facts: Old age pensioners, the plaintiffs herein, are complaining about an amendment to the Old Age Pension Act which concerns payments to inmates of mental institutions. As a method of procedure the payments are to be made to the Chief Financial Officer of the institution and he in turn is to disburse the money to

the inmates. The pensioners complain that this method of procedure is unconstitutional. The pensioners, the plaintiffs herein, are in no way connected with any institution.

Appeal: Held for defendants.

Reasons: This amendment sets up payments to inmates of institutions and said payments are to be made to the Chief Financial Officer. Thus only the rights of two parties are involved herein. They are (1) the Chief Financial Officer and (2) the inmates of the institutions. Petitioners do not fall into either group for they are merely old age pensioners.

An act entitling inmates of a state institution to participate with others in proceeds of the old age pension fund is constitutional and only parties in interest can challenge the constitutionality of the method of payment provided. The pensioners in this case have no interest in this act.

II. *People v. Schaeffer*, 1953-54 C.B.A. Adv. Sheet No. 11.

Facts: Plaintiff herein was adopted by her uncle now deceased after she had reached her majority. Defendant, Inheritance Tax Department taxed plaintiff as a Class C beneficiary, a niece. Plaintiff contends she is a Class A beneficiary—an adopted child.

The statutory provisions pertinent in this case are contained in Section 14, Chapter 85, '35 CSA as amended by Chapter 146, SL 41 which imposes a graduated rate of tax upon inheritance by dividing beneficiaries into classes. Class A is subject to the lowest rate of tax and includes a father, mother, husband, wife, child or any child or children legally adopted as such. The portion of the statute which forms the basis of this controversy is as follows: "Provided, however, that for the purpose of this act no person shall be considered legally adopted unless the adoption decree was entered prior to such person reaching the age of 21 years."

There is approximately $10,000.00 involved herein. Plaintiff contends that in setting up the age of 21 the legislature was arbitrary, unjustly discriminate and therefore this part of the act is unconstitutional.

Appeal: Held for defendant.

Reasons: 1. 21 is not an arbitrary age. The reasoning is that if a person is under 21 and is adopted greater family ties occur.

2. If a person is adopted over the age of 21 it is quite often done so as to evade paying inheritance taxes.

3. Legislation which sets up two classes of adopted children for inheritance tax purposes based upon whether the child was adopted before or after age 21 is not discriminatory or unconstitutional for such classifications have sanction in reason and logic.

4. *Stare decisis* does not mean the perpetuation of error. The Court here refers to a former case in which the opinion was just the opposite, being *Hoggan v. The People* being opinions dated August 14, 1954, Issue No. 17 and the Supreme Court hereby overrules its opinion in that case.

PROBATE LAW

I. *Kling v. Phayer,* 1953-54 C.B.A. Adv. Sheet No. 18.

Facts: Plaintiff, administratrix of Phayer estate, sues defendant for $112.50 damages to Phayer's automobile and $707.82 for funeral expenses. Defendant's negligence was clearly established and is not at issue. Defendant claims administratrix cannot maintain an action for the recovery of funeral expenses. It is contended that this can only be collected under the Wrongful Death Statute which limits the parties in interest to the immediate family, and plaintiff is not a member of the immediate family in this case. However, the plaintiff adminstratrix contends she has the right to maintain the action under our Survival Statute being Chapter 176, Section 247, '35 CSA which reads, "All actions in law whatsoever save and except actions on the case for slander or libel, or trespass or injuries done to the person, and actions brought for the recovery of real estate, shall survive to and against executors, administrators and conservators."

Appeal: Held for plaintiff.

Reasons: The present action is for recovery independent of the Wrongful Death Statute. The administratrix here is not seeking to recover for injuries to the person as provided in the Statute but is trying to recover for damages to decedent's property, that is: Diminution of decedent's estate which would result from the payment of the funeral bill.

The instant case is an action in law as provided in Section 247, Chapter 176, '35 CSA Supra and is not one of the exceptions, namely an action for slander or libel or trespass for injuries done to the person nor for the recovery of real estate, and therefore it survives to the administratrix. So under the Survival Statute an administratrix can recover for the diminution of the estate as a result of damages to an automobile and the payment of funeral expenses.

II. *RE: A. C. McLaughlin,* 1953-54 C.B.A. Adv. Sheet No. 7.

Facts: Testator, a resident of California left a holographic will unwitnessed and in which he left certain Colorado property to his sister and the residue to the Texas School of Medicine. The will was valid in California and admitted to probate. It was later admitted in this jurisdiction as a foreign will. Two minors of the deceased daughter of the testator who were excluded from the will filed a *caveat* through their guardian claiming:

(1) The will because it is holographic and unwitnessed though validly executed in California is voidable in Colorado as to Colorado real estate despite the provisions of the Colorado foreign will statute.

(2) The gift in the will to testator's surviving sister is void for vagueness, ambiguousness, uncertainty and impossibility of administration.

(3) The gift in the will to the University of Texas is likewise

void because the "School of Medicine, University of Texas," is not a legal entity capable of taking a gift.

Appeal: Judgment affirmed.

Reasons: A foreign will if valid in a foreign jurisdiction is valid in Colorado and may be admitted to probate. The filing of a *caveat* although permissible does not effect the validity of a foreign will.

Section 39, Chapter 176, '35 CSA provides that a will must be in writing, signed and acknowledged by the testator in the presence of two witnesses and declared by him to be his last will and testament. Section 62A as amended in 1947 provides, "As used in this section the words 'foreign will' means an instrument in writing which has been or shall be admitted to probate as the last will and testament or codicil of a decedent before any court or tribunal other than a court of this state, such court or tribunal being authorized by the laws of such jurisdiction to admit the same to probate, *whether or not such instrument was executed in accordance with Section 39 of this Chapter.*"

It is further provided in this opinion that the devise to the sister was not ambiguous and, therefore, valid.

It is also further provided that the devise to the Texas School of Medicine was valid as shown by these citations. The School of Medicine was a part of the University of Texas and as such a legal entity.

ATTORNEYS, COURTS, EQUITY

By FLOYD K. MURR, *of the Walsenburg Bar*

ATTORNEYS

Under the classification of attorneys two cases were decided by the Supreme Court during the past year. In *People v. Logan,*[1] the Supreme Court disbarred an attorney who wrongfully spent for his own purpose money received by him from his client for the purchase of property. The attorney had also retained money collected by him for clients, refusing to make settlement until after complaint was made to the Grievance Committee of the Bar Association. The referee had recommended suspension but the Court felt compelled to go beyond because of the gravity of the charges.

In *People v. Woodall,*[2] a layman was fined $200 by the Supreme Court for drafting and causing to be executed a will. The only phase of the case presenting a new element was the defense of respondent, a bank cashier, who alleged he did it because the town's only resident attorney was always away. The Court apparently was not impressed with this unusual defense.

---

[1] 1953-54 C. B. A. Adv. Sh. No. 17.
[2] 1953-54 C. B. A. Adv. Sh. No. 7.